II. STATEMENT OF THE CASE [1]

This docket commenced January 15, 1999 when Western Wireless filed a Complaint with the Commission after Consolidated unilaterally disconnected Western Wireless' interconnection service which disrupted telephone service for Western Wireless' customers. In its Complaint, Western Wireless alleged that Consolidated unlawfully shut off service necessary to serve customers in Regent, North Dakota with a wireless local loop. (Complaint, ¶¶ 7-10). On January 20, 1999, the Commission concluded the Complaint stated a *prima facie* case and moved to serve the Complaint on Consolidated.

On February 9, 1999, Consolidated answered the Complaint and asserted a Counterclaim. In its Counterclaim, Consolidated alleged that Western Wireless was a competitive local exchange carrier and therefore operating illegally because it did not have a CPCN from the Commission. Even though lack of a CPCN would not justify the illegal disconnection of service, Consolidated's Counterclaim raised the issue of whether Western Wireless needed a CPCN to provide its wireless local loop service, called wireless residential service ("WRS"), in Regent. On March 3, 1999, Western Wireless filed its Answer to the Counterclaim and moved to dismiss the Counterclaim because the State is preempted under federal law from imposing any CPCN requirement on CMRS providers such as Western Wireless.

On March 10, 1999, the Commission held a formal evidentiary hearing. Western Wireless sponsored the testimony of Kim Schmidt, Special Projects Manager for Western Wireless. (March Tr. 23). Consolidated sponsored the testimony of Douglas Meredith, director of economics and

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[1] Transcript references to the September 26, 2000 hearing will be designated as "Sept. Tr. ___". References to the March 10, 1999 transcript will be designated as "March Tr. __". All exhibits will be identified by "Party Ex. __".

pricing division of John Staurulakis, Inc., and Dan Wilhelmson, CEO and General Manager of Consolidated. (March Tr. 123).

The Commission issued its Findings of Fact, Conclusions of Law and Order on August 31, 1999 (the "Order"). Based on the record evidence, the Commission determined Consolidated violated two State statutes and the North Dakota Administrative Code when it disconnected service to Western Wireless. Specifically, the Commission found Consolidated violated N.D.C.C. § 49-21-07, which prohibits any telecommunications company from discriminating against another carrier. (Order, p. 6). The Commission further concluded Consolidated violated N.D.C.C. § 49-21-10, which provides that "every telecommunications company operating in this state shall receive, transmit, and deliver, without discrimination or delay, the telecommunications of every other telecommunications company with which a connection has been made." (Order, p. 7). Finally, the Commission determined Consolidated contravened North Dakota Admin. Code § 69-09-05-02, which requires a utility to give advance notice before disconnecting service. (Order, pp. 4-5). For these violations, the Commission imposed a $15,000 fine on Consolidated. (Order, p. 12).

The Commission additionally concluded Western Wireless is not required to obtain a CPCN because its WRS is a mobile cellular service governed by federal law. Based on the evidence, the Commission found that Western Wireless' WRS has mobile capabilities and is therefore a mobile service. Thus, the Commission properly reasoned the State is federally preempted from imposing rate or entry regulation on Western Wireless' service under 47 U.S.C. § 332(c)(3)(A) and may not require Western Wireless to obtain a CPCN. (Order, p. 12). Accordingly, the Commission dismissed Consolidated's Counterclaim. (Id.).

On September 14, 1999, Consolidated filed a Petition for Reconsideration with the Commission. The Commission did not act on Consolidated's petition within 30 days and it was deemed denied by operation of N.D.C.C. § 28-32-14.

Consolidated then appealed the Commission's decision to the South Central Judicial District Court. During the appeal, Consolidated sought to offer into evidence two additional documents. The first additional document is a copy of a WRS Demo/Loaner Equipment Agreement ("Equipment Agreement") (Consolidated Ex. 6). The second additional document is a copy of a Wireless Residential Service Agreement ("Service Agreement") (Consolidated Ex. 7). These documents were obtained by Consolidated through discovery in a federal antitrust lawsuit Western Wireless brought against Consolidated for its unlawful disconnection of service. (Sept. Tr. 18, 26). In that case, the federal District Court found Consolidated violated antitrust laws and entered summary judgment in favor of Western Wireless. (Sept. Tr. 26).

The South Central Judicial District Court granted Consolidated's request and accepted the Service Agreement and Equipment Agreement as evidence. On January 18, 2000, without further action, the District Court referred the matter back to the Commission to consider whether to "amend or reject" its initial Order in light of the additional evidence offered by Consolidated.

Western Wireless also brought a motion asking the District Court to accept two additional documents into evidence, which request the District Court granted on February 18, 2000. The first additional document was an Addendum to the Cellular One Wireless Residential Service Agreement ("Service Agreement Addendum") which is Western Wireless Exhibit 1 in this proceeding. The second additional document is an Addendum to the Wireless Residential Service Demo/Loaner Equipment Agreement ("Equipment Agreement Addendum"), which is Western Wireless' Exhibit

2 in this proceeding. The effect of the Service Agreement Addendum and Equipment Agreement Addendum is to negate the provisions of the additional evidence offered by Consolidated.

Pursuant to the District Court's referral, a further evidentiary hearing was held before the Commission on September 26, 2000. Western Wireless sponsored the testimony of RaeAnn Kelsch, Manager of External Relations at Western Wireless. (Sept. Tr. 33). Consolidated sponsored the testimony of Mr. Wilhelmson. (Sept. Tr. 16). At the close of the hearing, the Commission ordered each party to file a post-hearing brief in the cause.

III. ARGUMENT

In its original Order, the Commission rightly dismissed Consolidated's Counterclaim because Western Wireless' WRS is a CMRS service. Based on 47 U.S.C. § 332(c)(3)(A), the Commission concluded Western Wireless is a CMRS provider exempt from State rate and entry regulation. Therefore, Western Wireless was not required to obtain a CPCN. The Commission should affirm its earlier decision because neither of the documents Consolidated offered changes the proven inherent mobility of WRS. Moreover, the Commission's well-reasoned Order fully comports with the FCC's directives, including the FCC's most recently issued decision: In the Matter of Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, Second Report and Order and Order on Reconsideration, FCC 00-246 (July 20, 2000) ("CMRS Flexibility Second Report and Order"). Finally, Consolidated's argument relating to the documents has been mooted by the amendments to the Service Agreement and the Equipment Agreement.

A. The Commission Should Disregard Consolidated's "New Evidence" Because The Additional Documents Do Not Affect The Inherent Mobility of WRS In General Nor The Wireless Access Unit in Particular.

The Commission should disregard Consolidated's "new evidence" and again reject Consolidated's argument that Western Wireless should have a CPCN to provide its WRS service in Regent. The Commission rightly found in its August 31, 1999 Order that the service provided by Western Wireless is a mobile cellular service. The Commission thoroughly examined the record evidence and rejected Consolidated's claim that Western Wireless' service was a "fixed wireless" offering for which Western Wireless needed a CPCN to operate in North Dakota. Western Wireless was providing a CMRS service at the time the Commission issued its Order and continues to offer a CMRS service today. Neither the passage of time nor anything in the two additional documents offered by Consolidated alters this fact.

Consolidated's reliance on the Service Agreement and the Equipment Agreement to overcome the Commission's prior determination is misplaced. Consolidated tries to make much of certain language contained in the Service Agreement and Equipment Agreement which were in effect in August, 1999. The key provision it relies on in the old version of the Service Agreement is as follows:

> The Unit is intended to remain stationary. Removing the Unit from the location where it was installed by us in violation of this Agreement will result in substantial additional fees to you, failure of the Unit, and/or termination of this Agreement.

Consolidated Ex. 7, ¶ 2. The old version of the Equipment Agreement contains similar language. Consolidated Ex. 6.

The language in these agreements does not warrant change of the Commission's prior determination that Western Wireless' service is mobile. First, the language does not describe or

change the technical capabilities of the service and cannot be relied upon for such a proposition. Mr. Wilhelmson agreed the language in the Agreements has no bearing on the WRS' mobility. (Sept. Tr. 26). The testimony of Western Wireless' witness Ms. Schmidt at the March 10, 1999 hearing further confirms WRS is a mobile service, no matter how it is described in the Service Agreement or Equipment Agreement. Just like Western Wireless' conventional cellular service, the WRS is provided over the same network, the same switching equipment, the same interconnection facilities, the same cell sites and cell site radio equipment and it utilizes the same CMRS radio frequency spectrum as conventional cellular service. (March Tr. 29). Instead of a bag phone or handheld phone, WRS customers use a Telular wireless access unit, which can be operated using AC power or battery backup. (March Tr. 30). Ms. Schmidt specifically demonstrated that the equipment operates in the mobile mode. She explained:

> An important attribute of wireless residential service is its mobility. Unlike landline service, and like conventional cellular service, wireless residential service is a service associated with a customer, not a specific location. This feature of wireless residential service allows a customer to take its phone to a neighbor's house, to the office, or another building or out in the field. Because the unit operates on either AC power or battery backup, it is mobile.

(March Tr. 30).

Ms. Schmidt specifically demonstrated the mobile characteristics of the Telular unit noting "it can be taken outside of the home and used, as well as any of our handheld phones." (March Tr. 34). Additionally, in response to a question from Commissioner Wefald, Ms. Schmidt noted: "The most attractive thing about wireless residential, it is really the consumer's choice how they would like to use this service because it has both capabilities, so it's however they would like to use the service." (March Tr. 43) (emphasis added). On this record evidence, the Commission properly found and concluded that WRS is mobile. The Commission noted: "Battery power provides mobility that

allows customers to operate wire-line telephones in a cellular fashion from a vehicle, other building, or outdoors." (Order, p. 10).

Second, as a practical matter, describing the wireless access unit in an agreement as "intended to remain stationary" does not make it so. In other words, one cannot by mere pronouncement change a Ford Ranger into a Cadillac. The Ranger is what it is. Likewise, WRS is what it is regardless of how it might be described in the Service Agreement or Equipment Agreement. Ms. Kelch's testimony explained the genesis of the language in the Equipment and Service agreements. (Sept. Tr. 37). It had a limited purpose and was never intended to describe or limit WRS's actual mobile capabilities. Western Wireless' witness Ms. Kelsch testified in detail at the September 26, 2000 hearing regarding the language in the two agreements. The Sales and Marketing Group initially inserted the language because Regent was a test market for Western Wireless' new deployment of WRS. (Sept. Tr. 37). The Sales and Marketing Group wanted to ensure optimum signal quality. (Sept. Tr. 37). Ms. Kelsch stated the Marketing Group believed signal strength could be optimized if customers were advised not to move the wireless access unit. She explained:

> By seeking to discourage customers from moving the equipment from its original location, the company actually sought to maintain a consistent, high level of signal quality to the customers, and this was especially true at the time the service was initially deployed because it was a new service offering and the company was unsure of what type of signal we would have, and we wanted to ensure that our customers received the optimum service. So this language, no matter how well-intentioned, was subsequently deleted from this agreement to leave no question to the mobility of the service.

(Sept. Tr. 37). Thus, the language relied upon by Consolidated in an attempt to reverse the Commission's decision was originally placed in the agreements, not because of any technical or practical limitations of the mobility of the service or equipment, but to ensure the best possible signal

strength for customers. This description was not called for by any technical person at Western Wireless and there was no other reason for inclusion of this language. (Sept. Tr. 37-38).

Significantly, WRS is the same type of service, e.g. a CMRS exempt from State entry and rate regulation, that is currently deployed to approximately 1,500 customers in Minnesota, Kansas, Nevada and Texas. (Sept. Tr. 39). None of the customer service agreements in those states includes the language relied upon by Consolidated. (Id.).

When the Commission issued its original Order, the Telular wireless access unit could be, and was, picked up and moved by Western Wireless' customers. This mobility was an attractive feature of the service. (March Tr. 43). Today, the Telular wireless access unit can be and is picked up and moved, as evidenced by one customer in another state who travels with it in his car. (Sept. Tr. 50). Mobility remains an attractive feature of the service.

Thus, the same technical evidence that supported the Commission's original finding of mobility supports the same finding today. Nothing has changed to warrant upsetting the Commission's previous determination that Western Wireless' WRS is a CMRS. Neither the Service Agreement nor the Equipment Agreement changes the actual mobility of the Telular wireless access unit or the WRS. Accordingly, the Commission should let stand its previous Order without modification.

B. The Commission's Original Decision Fully Comports With FCC Directives Then and Now.

i. The Commission properly analyzed FCC directives regarding CMRS status when it issued its Order.

The Commission thoroughly examined and properly applied existing FCC guidelines relating to the classification of mobile services in its Order. The FCC's directives supported the Commission's determination that Western Wireless' service is a CMRS and therefore the State is

preempted from imposing State rate and entry regulation, including any CPCN requirement. The FCC's regulations continue to apply to support the Commission's original determination.

The Commission's analysis to support its mobility determination in the Order follows federal law. The Commission correctly noted the general rule that CMRS offerings are expressly exempt from State entry and rate regulation. (Order, p. 9). Section 332(c)(3)(A) of the Communications Act of 1934 (the "Act"), as amended, provides in pertinent part as follows:

> [N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3)(A) (emphasis added). The federal preemption under Section 332(c)(3)(A) continues to be the governing law today.

The Commission further recognized the FCC's existing rules allowing CMRS licensees to provide all forms of mobile services on their assigned CMRS spectrum. (Order, p. 9). The Commission noted the Act's definition of the term "mobile service" includes a "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves." (Order, pp. 9-10 (quoting 47 U.S.C. § 153(27))). The Commission further noted the FCC's definition of a "mobile station" as "[o]ne or more transmitters that are capable of operation while in motion." (Order, p. 10 (quoting 47 C.F.R. § 22.99)) (emphasis added). The federal definition of a "mobile station" which includes a device capable of operating while in motion remains controlling law today.

Moreover, the Commission correctly recognized that services provisioned utilizing dual-use equipment are classified by the FCC as "mobile" services. (Order, pp.10-11). The Commission quoted the key language of the FCC's 1994 Order, In the Matter of Implementation of Sections 3(N)

and 332 of the Communications Act Regulatory Treatment of Mobile Service, GN Docket No. 93-252, 9 FCC Record 1411, Second Report and Order (March 7, 1994): "Services provided through dual-use equipment . . . which are capable of transmitting while the platform is moving, are included in the mobile services definition." (Order, p. 11). The FCC's determination that services provided by dual-use equipment are "mobile services" continues to be the governing law today.

The Commission further recognized the FCC's 1996 reaffirmation that services with both fixed and mobile capabilities are "mobile" services under federal law. (Order, p. 11); See Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rule Making, 11 FCC Rcd. 8965 (June 27, 1996) ("CMRS Flexibility Order/FNPRM"). Specifically, the FCC reiterated its conclusion that auxiliary or incidental services provided through dual-use equipment, similar to Western Wireless' WRS are "mobile" for purposes of the Act and exempt from State regulation.

> In reviewing the definition of "mobile service" under the Communications Act, we have concluded that services having both fixed and mobile capabilities, e.g. services provided through dual-use equipment, fall within the statutory definition. In contrast, we have concluded that services that are solely fixed in nature, e.g. fixed point-to-point services such as Basic Exchange Telephone Radio Service (BETRS) do not constitute "mobile service" within the meaning of the statute.

CMRS Flexibility Order/FNPRM at 7 (footnotes omitted) (emphasis added).

Accordingly, even if the Telular wireless access unit were viewed as having both fixed and mobile characteristics, the services provided by Western Wireless in Regent and elsewhere retain their CMRS regulatory status as auxiliary or incidental services under the FCC's determinations. This conclusion exempts Western Wireless from any certification requirement under 47 U.S.C. § 332(c)(3)(A).

Based on these FCC directives and the record evidence, the Commission rightly concluded that "WRS has mobile capabilities and is therefore a mobile service." (Order, p. 11). The Commission's conclusion that WRS is a mobile CMRS offering fully comports with federal law. Moreover, this determination is the same conclusion reached by other State commissions that have analyzed the issue. For instance, the Kansas Corporation Commission considered and rejected any certificate requirement when designating Western Wireless' affiliate as a State and federal ETC. Order # 6 Granting Sprint PCS and Western Wireless ETC Designation in Non-Rural Telephone Company Wire Centers for Federal Universal Service Support, Kansas Corporation Commission, Docket No. 99-GCC2-156-ETC (Jan. 19, 2000). Based on the preemption for CMRS providers in 47 U.S.C. § 332(c)(3)(A), the Kansas Commission properly concluded "that Western Wireless and Sprint PCS are not required to obtain a certificate of convenience and authority as a condition to being designated ETCs." Id. at 4.

The federal law and the FCC's regulations have not changed since the issuance of the Order. Any State certification requirement imposed on a provider of CMRS service is still preempted under 47 U.S.C. § 332(c)(3)(A). The Commission, therefore, should affirm its earlier determination that Western Wireless' WRS is a mobile cellular service exempt from CPCN requirements and affirm its dismissal of Consolidated's Counterclaim.

ii. The Commission's Order Also Comports With The FCC's Most Recent Directive Regarding CMRS.

The FCC's recent CMRS Flexibility Second Report and Order does not change the facts or law underlying the Commission's earlier decision. In his testimony, Mr. Wilhelmson identified the CMRS Flexibility Second Report and Order. (March Tr. 22). However, he was unable to respond

to any questions concerning how it would support Consolidated's argument that Western Wireless' WRS is not a mobile service. (Sept. Tr. 28).

A careful review of the various FCC's orders demonstrates the most recent decision is inapplicable to this proceeding. Rather, the CMRS Flexibility Report and Order supports the correctness of the Commission's Order finding that Western Wireless' WRS is a CMRS service. The FCC's most recent directive on mobile services does nothing to bolster Consolidated's position or cast doubt on the validity of the Order. Rather, the CMRS Flexibility Second Report and Order reaffirms the FCC's prior determinations and guidelines for determining whether a service is a CMRS. The focus of the FCC's recent CMRS Flexibility Second Report and Order is on the provisioning of "fixed wireless services on a co-primary basis" with commercial mobile services. It does not address or change the regulatory treatment of dual-use equipment such as the wireless access unit used by Western Wireless to provision WRS in Regent.

In 1994, the FCC issued an order interpreting the statutory definition of "mobile service" and addressing federal preemption of State regulatory authority over CMRS providers. (1994 CMRS Order). As recognized by the Commission in its Order, the FCC determined that auxiliary or incidental services using dual-use equipment are CMRS offerings likewise exempt from regulation by State commissions. (Order, p. 11). In its 1994 CMRS Order, the FCC explicitly concluded that the statutory definition of "mobile service" over which State regulation is preempted includes "all auxiliary services provided by mobile service licensees." ¶ 36; see also 47 C.F.R. § 20.7(g) ("mobile services" includes "auxiliary services provided by mobile service licensees, and ancillary fixed communications offered by personal communications services providers"). The FCC's actions were intended to offer flexibility to licensees providing CMRS to provide fixed services that complement or support their mobile service offerings. Although the FCC did not specifically define "auxiliary"

or "ancillary" service, it did conclude that services provided with equipment which is capable of operating either in a fixed mode or a mobile mode are included in the definition of "mobile services" as a matter of federal law and are exempt from state regulation by virtue of Section 332(c)(3)(A) of the Act. 1994 CMRS Order at ¶ 38. In this regard, the FCC stated:

> Services provided through dual-use equipment . . . which are capable of transmitting while the platform is moving, are included in the mobile services definition.

Id. at ¶ 38 (emphasis added).

In 1996, the FCC adopted new regulations to expand permitted offerings of fixed wireless service by CMRS providers. See CMRS Flexibility Order/FNPRM. Specifically, the FCC amended its rules to allow service providers using spectrum allocated for CMRS to provide fixed services on a co-primary basis with mobile services. The changes were designed to allow service providers to choose to provide exclusively fixed services, exclusively mobile services or any combination of the two. CMRS Flexibility Order/FNPRM at ¶ 24. As it relates to a cellular carrier, the FCC modified the language of 47 C.F.R. 22.901(d) to authorize fixed services on a co-primary basis.

The FCC's decision to allow co-primary fixed use of CMRS spectrum initially raised the related issue of how such fixed service offerings would be classified for regulatory purposes. The FCC did not adopt any thresholds or ceilings on the relative levels of fixed or mobile services associated with the term "co-primary." CMRS Flexibility Order/FNPRM, ¶ 24. Rather, the FCC proposed to establish a rebuttable presumption that licensees offering fixed wireless services over CMRS spectrum are within the definition of CMRS and consequently would be regulated as CMRS. CMRS Flexibility Order/FNPRM at ¶ 53-54. The proposed rebuttable presumption would have applied to fixed wireless service applications offered over frequency bands in conjunction with CMRS offerings. Under this proposed approach, the FCC would allow an interested party to

challenge a presumption regarding a particular fixed wireless service to determine whether the FCC would regulate the particular offering as CMRS. CMRS Flexibility Order/FNPRM at ¶ 54.

The FCC's proposed treatment of fixed wireless services offered on a co-primary basis in the CMRS Flexibility Order/FNPRM did nothing to alter the regulatory treatment of CMRS licensees under the FCC's previously existing rules. The FCC clearly stated:

> At the outset, we emphasize that our decision to allow carriers to offer co-primary fixed services on spectrum allocated

STATE OF NORTH DAKOTA

BEFORE THE PUBLIC SERVICE COMMISSION

WESTERN WIRELESS CORPORATION vs. CONSOLIDATED TELEPHONE COOPERATIVE, INC. COMPLAINT	)))	CASE NO. PU-1564-99-17

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF MORTON)

Valerie Ehrlich, being first duly sworn, on oath, deposes and says: That she is a citizen of the United States, over the age of eighteen and not a party to the above-entitled action.

That on the 24th day of October, 2000, this affiant deposited in the United States Post Office at Mandan, North Dakota, a true and correct copy of the following document(s) in the above captioned action:

1. Findings of Fact, Conclusions of Law, Order; and
2. Western Wireless Corporation's Supplemental Brief.

That a copy of the above document(s) was securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

MICHAEL J MAUS
ATTORNEY AT LAW
PO BOX 570
DICKINSON ND 58602-0570

MICHAEL A BOSH
ATTORNEY AT LAW
PO BOX 1000
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Valerie Ehrlich

Subscribed and sworn to before me this 24th day of October, 2000.

LORI SPENCER
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires APRIL 18, 2006

Notary Public

1220544.1

10/27/00

BEFORE THE

PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

In the Matter of	)	
	)	
Western Wireless Corporation, d/b/a Cellular One,	)	
	)	
Complainant,	)	
	)	Case No. PU-1564-99-17
vs.	)	
	)	
Consolidated Telephone Cooperative,	)	
	)	
Respondent.	)	

BRIEF OF CONSOLIDATED TELCOM
ON REMAND FROM
STATE DISTRICT COURT

TABLE OF CONTENTS

NATURE OF PROCEEDINGS

The Public Service Commission (PSC) held that it was federally preempted from imposing any requirement on Western Wireless Corporation for a Certificate of Public Convenience and Necessity for its Wireless Residential Service (WRS) in Regent, North Dakota, because such service was a "mobile" service. This proceeding was appealed from the North Dakota Public Service Commission, Case No. PU-1564-99-17, to the State District Court. On January 18, 2000, the State District Court remanded the matter to the PSC to receive additional evidence.

THE PARTIES AND THE PRINCIPAL FACTS

Western Wireless Corporation (Western Wireless) aka Cellular One provides mobile cellular telephone service in North Dakota under licenses issued by the Federal Communications Commission.

Consolidated Telcom (Consolidated) provides landline local exchange telecommunications service in a number of local exchange areas in the counties of Adams, Billings, Bowman, Dunn, Hettinger, McKenzie, Slope and Stark in southwestern North Dakota, under certificates of public convenience and necessity issued by the North Dakota PSC pursuant to the provisions of Chapter 49-03.1, NDCC. Regent is one of the communities served by Consolidated.

"Cellular" is a term commonly used to describe a certain category of telecommunications service. Cellular service is included in the definition "commercial mobile service", 47 U.S.C. 332(d)(1) and its synonym "commercial mobile radio service" (CMRS), 47 C.F.R. 20.3 and 20.9. Radio telephone service is commonly called "wireless", as distinguished from wired service which is also called wireline or landline service. "Cellular" usually connotes commercial mobile radio in a certain spectrum. Under Section 332 of the Telecommunications Act, no state or local government has authority to regulate market entry of or the rates charged by any provider of commercial mobile service.

On August 21, 1998, Western Wireless submitted an Access Service Request ("ASR") to Consolidated for 2000 direct inward dialed numbers and a local T-1 circuit with six trunks at Regent, North Dakota. The ASR did not indicate that the service would be used for the provision of fixed residential service by Western Wireless. Consolidated had previously provided similar service to

Western Wireless for its cell site located in Consolidated's Bowman exchange for use by Western Wireless cellular mobile customers. The service requested was installed and turned up for service on September 18, 1998.

On January 7, 1999, Western Wireless initiated "Wireless Residential Service" (WRS) a wireless local loop offering designed to compete with the local services offered by Consolidated in Regent. These services were made possible by Western Wireless' purchase from Consolidated of a local DID trunk to route calls from Consolidated's customers to Western Wireless' customers, along with Consolidated's assignment to Western Wireless of 2000 local telephone numbers.

The WRS service offered by Western Wireless is provisioned by giving each subscriber a "black box" approximately the size of a lap top computer which is designed to be hung on a wall. The box functions as a radio transmitter and receiver, but requires the connection of a standard telephone and power either from a standard outlet or its internal batteries in order for a subscriber to place or receive calls. Although the box is transportable, it is not designed or intended to be used in mobile services.

Consolidated discovered additional evidence after the hearing in this matter. Western Wireless had failed to provide this evidence to the PSC. The additional evidence consists of two documents: a Residential Service Demo/Loaner Equipment Agreement and a Wireless Residential Service Agreement. Both of these agreements specifically state that "The unit is intended to remain stationary." They warn the customer that moving the unit may result "in substantial additional fees to you, failure of the Unit, and/or termination of the agreement."

As soon as Western Wireless became aware that Consolidated intended to bring the agreements to the attention of the PSC, Western Wireless attempted to modify them by having their customers sign addendums. Tr. at page 56.

ISSUE

Is Western Wireless Corporation's WRS offering in Regent a radio-communications station a device which ordinarily does move?

ANSWER: No. Western Wireless and its customers intended that the device remain stationary.

ARGUMENT

A. The tellular device used by Western Wireless for its WRS service in Regent, North Dakota, is not a device which ordinarily does move and therefore the WRS is not a "mobile" service.

Section 332(c)(3) of the Federal Telecommunications Act provides:

> [N]o state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . ."

It is uncontested that if the Wireless Residential Service Western Wireless is offering in Regent, and intends to offer statewide, is a "commercial mobile service" as defined by federal law, then entry regulation by the PSC is prohibited. The question is whether this service is commercial mobile service.

Although the WRS service is designed to provide an alternative to the local exchange service offered by wireline telephone companies, Western Wireless in this case has attempted to "spin" the nature of its offering to squeeze it into the mobile definition. There is no dispute that the offering is "commercial" or that it is a "service". However, it strongly disputed that the offering is "mobile".

Western Wireless argued that because the subscriber premise equipment can be transported from one residence to another, and can operate on batteries instead of house current, the service offered is "mobile". The Communications Act provides for a different result.

The Act defines "mobile service" as:

> [R]adio communications service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves . . . 47 U.S.C. 153(27).

"Mobile station", in turn is defined as:

> A radio-communications station capable of being moved **and which ordinarily does move.** (Emphasis supplied)

This is the language. The simple issue is whether the device used in Regent, North Dakota, is a radio-communications station which ordinarily does move. The agreements which Western Wireless had with its customers require that the units remain stationary. If they remain stationary, then they do not ordinarily move. They cannot do both.

Thus, although the black box which Western Wireless places on the subscriber premises to complete its wireless loop may be "capable of being moved", it is neither intended to be moved nor is it "ordinarily moved." It does not meet the statutory definition of "mobile service."

It takes no more than common sense and every day knowledge to understand that "ordinary" users with a need for mobile communications will not carry with them a box the size of a laptop computer *and* a regular telephone, when shirt pocket sized mobile units are readily available on the market. And, Western Wireless cannot argue that although the contracts were in effect, since they didn't enforce the provision, it can be ignored.

Western Wireless required the devices to remain stationary because if moved, the effect would be to cannibalize its real mobile service. Since the WRS offers unlimited calling for $14.99 per month, customers to the mobile service with similar calling scope requirements would abandon that service which charges on a per minutes basis.

The essence of Western Wireless's position continues to be that regardless of its operational characteristics, and their own requirement that it remain stationary, the Wireless Residential Service is exempt from state entry regulation under Section 332(c)(3) because the FCC considers the service "ancillary" to a commercial mobile service and therefore legally a mobile service, even if it is not in fact mobile. This claim is wrong.

Counsel for Western Wireless previously acknowledged that the issue of the regulatory status of fixed wireless service, other than ancillary, auxiliary and incidental, was the subject of an open FCC proceeding. The FCC has now explicitly ruled, in its

Second Report and Order and Order on Reconsideration in FCC 00-246, that it will not adopt the rebuttal presumption that fixed and integrated/fixed mobile services are mobile. The ruling states ". . . it is difficult to set out in advance factors that we should consider in establishing such a presumption or otherwise determining the regulatory treatment of any particular fixed wireless or integrated fixed/mobile service." In other words, the proposed rule that was before the FCC in August of 1999, has been rejected by the FCC.

At paragraph 7 of FCC's 00-246, the FCC acknowledges that CMRS providers can offer mobile customers an increasing variety of services including data transmission, internet access and other services traditionally associated with fixed service. Thus, the FCC states, ". . . we believe it is inappropriate to establish a bright line test". A bright line test, the FCC goes on to state, might even limit or discourage the development of services. What this means is that the WRS service in Regent is before this Commission on its own facts without any presumption that it is mobile, and the facts now before the PSC show that Western Wireless required the device to remain stationary.

The evidence introduced by Consolidated in exhibits 7 and 8 show the intent of Western Wireless that their device remain stationary. The witness for Western Wireless attempted to explain why that language was inserted into the contract. From her own testimony, she is not qualified to address that question. ReAnn Kelsch described herself as the Manager of External Affairs. Tr. at page 33. She stated that the language was inserted in the agreements by the Sales & Marketing Group. Tr. at page 37. She acknowledged that it did not make any difference who requested the provision in the contract as to whether it was enforceable. Tr. at page 45. She admitted that she did not know the meaning of "failure of the unit". Tr. at page 46. In response to a question about service quality, she said "that was the indication that we have gotten from Sales & Marketing." Tr. at page 51. She was uncertain as to why language was inserted involving additional fees. Tr. at page 57. She couldn't answer the question of why language was put in regarding termination of the agreement. Tr. at page 59.

Her attempted explanation was that the Marketing Department requested that this language be inserted in the contracts because if the device was moved, the service may not be as good. Tr. at

pages 37 and 38. She said that Western Wireless recommended ". . . to our customers that they keep the equipment in its original location. . . ." Tr. at page 38.

Ms. Kelsch admitted that the agreements unequivocally state that the devices cannot be moved. Tr. at page 44.

These responses do not explain why additional fees would be due or why the contract would be terminated if the device was moved. The plain truth is that the language was inserted in the agreements because Western Wireless did not intend the devices to be moved, they intended them to remain stationary. They didn't want any difficulty in locating and repossessing the tellular device in the event the customer did not pay his or her bill.

Western Wireless attempted to change its agreements after it became aware that Consolidated was going to bring the agreements to the attention of the PSC. Tr. at page 56. Regardless of whether they changed the agreements or not, the documents show the clear intent of Western Wireless that the devices remain stationary. If they are intended to remain stationary, they do not fit the statutory definition of mobile service.

Consolidated believes that the Commission must make its ruling based upon the evidence as it existed on August 31, 1999. The State District Court did not direct the PSC to reopen the issues and have a complete new hearing, it directed the PSC to consider the additional evidence. However, regardless of what point in time the PSC chooses to use in reaching its decision, the documents clearly evidence the intent of Western Wireless that the devices remain stationary and hence were not of the type that ordinarily move.

Whatever the reasons for the insertion of the language, Western Wireless did restrict the movement of the tellular device. None of the testimony at the rehearing explained how their intent that the devices remain stationary has changed.

A device which by contract must remain stationary is not a device "which ordinarily does move." The service provided in Regent is not mobile service and therefore is not exempt from regulation under §332.

B. The North Dakota Public Service Commission is not federally preempted from requiring Western Wireless to obtain a Certificate of Public Convenience and Necessity for its Wireless Residential Service (WRS).

The United States Supreme Court has established the principles and process of analysis to determine whether federal action (by Congress or an authorized agency) has the effect to preempt states' action affecting the same subject. ***Louisiana Public Service Commission v. FCC***, 476 U.S. 355, 106 S. Ct. 1890 (1986). In ***Louisiana***, as in this case, the central issue was whether FCC action under the Communications Act has the purpose and effect to preempt state jurisdiction - state jurisdiction that unquestionably exists unless federal authorities have taken preemptory action.

In its decision in this case, the North Dakota PSC did not correctly apply ***Louisiana*** analysis to the preemption issue. As stated in the ***Louisiana*** decision, there are several ways ("varieties") by which federal action might preempt states from acting in the same subject area, always guided by the foundation principle:

> "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." 106 S. Ct. at 1899.

As explained by the Court in ***Louisiana***, "Pre-emption occurs

[1] when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law,
[2] when there is outright conflict between federal and state law,
[3] where compliance with both federal and state law is in effect physically impossible,
[4] where there is implicit in federal law a barrier to state regulation,
[5] where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or
[6] where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.
[7] Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state